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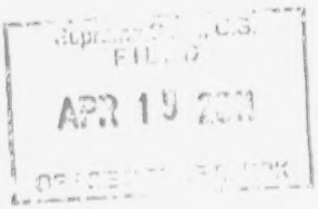

No. 10-925

IN THE
Supreme Court of the United States

GRAND TRUNK WESTERN RAILROAD, INC.,
Petitioner,

v.

WILLIAM E. SHEPARD,
Respondent.

On Petition for a Writ of Certiorari to the Court of Appeals of Ohio, Eighth Appellate District

BRIEF FOR RESPONDENT IN OPPOSITION

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April 19, 2011

QUESTIONS PRESENTED

1. Whether this case should be held pending this Court's resolution of *CSX Transportation, Inc. v. McBride*, No. 10-235 (U.S. argued Mar. 28, 2011), even though petitioner forfeited the argument that the Federal Employers' Liability Act, 45 U.S.C. §§ 51-60, requires proof of "proximate cause."

2. Whether the Ohio courts erred in not deferring to the interpretation of a federal regulation advanced by petitioner's retained expert witness, where petitioner never argued in the state courts that such deference was warranted and where that witness no longer worked for the agency that promulgated the regulation at issue.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iii

INTRODUCTION 1

STATEMENT 4

REASONS FOR DENYING THE PETITION 11

I. THE PETITION SHOULD NOT BE HELD PENDING *McBRIDE* BECAUSE PETITIONER DID NOT PRESERVE THE ISSUE PRESENTED IN THAT CASE 11

II. PETITIONER'S SECOND QUESTION IS NOT PROPERLY PRESENTED HERE AND REVIEW IS UNWARRANTED IN ANY EVENT 12

A. Petitioner Forfeited Its Deference Claim And, In Any Event, Identifies No Agency Interpretation To Which Deference Could Be Given 13

B. In Any Event, Review Is Unwarranted 14

CONCLUSION 17

TABLE OF AUTHORITIES

Page

CASES

Auer v. Robbins, 519 U.S. 452 (1997) 14, 15

Bowles v. Seminole Rock & Sand Co., 325 U.S. 410 (1945) 14

Chase Bank USA, N.A. v. McCoy, 131 S. Ct. 871 (2011) 3

Coleman v. Thompson, 501 U.S. 722 (1991) 13

Duignan v. United States, 274 U.S. 195 (1927) 14

Lyng v. Payne, 476 U.S. 926 (1986) 14

Rogers v. Missouri Pac. R.R. Co., 352 U.S. 500 (1957) 2, 9, 10, 12

Thomas Jefferson Univ. v. Shalala, 512 U.S. 504 (1994) 14

Urie v. Thompson, 337 U.S. 163 (1949) 5, 15

Wharf (Holdings) Ltd. v. United Int'l Holdings, Inc., 532 U.S. 588 (2001) 4

STATUTES, REGULATIONS, AND RULES

Boiler Inspection Act, ch. 103, 36 Stat. 913 (1911) 1

Federal Employers' Liability Act, 45 U.S.C. §§ 51-60 ..... 1, 2, 5, 9, 11, 15

§ 1, 45 U.S.C. § 51 5

§ 3, 45 U.S.C. § 53 ..... 6, 15, 16

Locomotive Inspection Act, 49 U.S.C. §§ 20701-20703 ..... 1, 5, 10, 15

49 C.F.R. § 229.43(a)..... 1, 2, 3, 5, 6, 10, 13, 15, 16
Ohio R. Civ. P. 51(A)..... 11

ADMINISTRATIVE MATERIALS

45 Fed. Reg. 21,092 (Mar. 31, 1980)..... 16

OTHER MATERIALS

CSX Transp., Inc. v. McBride, No. 10-235 (U.S.):

Brief for Petitioner (filed Jan. 13, 2011)..... 12

Petition for a Writ of Certiorari (filed Aug. 18, 2010)..... 11

INTRODUCTION

Over the course of his more than 40 years working for petitioner's railroad, respondent was exposed to dangerous diesel exhaust fumes and asbestos. As a result of that exposure, he suffers from multiple serious health problems. To recover for his employment-related injuries, respondent brought an action under the Federal Employers' Liability Act ("FELA"), 45 U.S.C. §§ 51-60. He alleged that petitioner was negligent in failing to provide safe working conditions. He further alleged that the presence of diesel exhaust fumes and asbestos in the cabs of the locomotives in which he worked violated the Locomotive Inspection Act ("LIA"), 49 U.S.C. §§ 20701-20703 (originally enacted as the Boiler Inspection Act, ch. 103, 36 Stat. 913 (1911)). The Federal Railroad Administration ("FRA") has implemented LIA in a rule providing that diesel exhaust must "be released entirely outside the cab" and that means must be provided "to prevent entry of" exhaust fumes "into the cab." 49 C.F.R. § 229.43(a). Respondent contended at trial that petitioner's failure to comply with LIA, as interpreted in the FRA's regulation, constituted negligence per se under FELA.

A jury found that petitioner violated FELA and LIA and that respondent suffered injuries resulting from those violations. The trial court entered judgment on the jury's verdict and denied petitioner's motion for judgment notwithstanding the verdict ("JNOV") or a new trial. The court of appeals of Ohio affirmed the trial court's judgment, and the Supreme Court of Ohio denied review.

Petitioner raises two claims in its petition. First, it contends that the petition should be held for *CSX Transportation, Inc. v. McBride*, No. 10-235 (U.S.

argued Mar. 28, 2011), because (it claims) this case presents the same issue that is before the Court in *McBride* — namely, whether "proximate cause" is an element of a FELA claim. Second, petitioner argues that the decision below conflicts with this Court's decisions requiring deference to agencies' interpretations of their own regulations, because (it asserts) the Ohio courts failed to defer to an FRA interpretation of § 229.43(a). Neither of those claims is properly presented here, and the petition should be denied.

I. Petitioner forfeited the argument that FELA requires a finding of "proximate cause." Although petitioner proposed a jury instruction that would have required such a finding, it failed to object to the trial court's decision not to give that instruction. Nor did it raise the absence of an instruction on "proximate cause" in its post-judgment motion in the trial court or on appeal in the state appellate court.

Petitioner did object to the trial court's instruction, consistent with this Court's precedent, that the jury could find petitioner liable if its "negligence played any part, even the slightest, in producing" respondent's injuries. *Rogers v. Missouri Pac. R.R. Co.*, 352 U.S. 500, 506 (1957). Petitioner's argument was that the trial court should have omitted the phrase "even the slightest" from the charge to the jury. But, even if that request had been granted, the jury instructions still would not have included any mention of the common-law concepts of "proximate cause" that petitioner now claims FELA incorporates.

Having failed to preserve in the Ohio courts the argument that "proximate cause" is an element of a FELA claim, petitioner should not be permitted to seek any benefit from this Court's decision in *McBride*.

II. Petitioner also argues that the lower courts should have deferred to the interpretation of § 229.43(a) espoused in the trial testimony of petitioner's retained expert witness, a former FRA employee. But petitioner never argued in the Ohio courts that its expert's testimony should be given deference. And, even if it had so argued, the testimony of a former agency employee has never been considered the *agency's* fair and considered judgment for purposes of this Court's cases on deference to an agency's regulatory interpretation. For each of those reasons, petitioner's deference claim is not properly presented here.

Further review of that claim would be unwarranted in any event. The standard for judicial deference to an agency's interpretation of its own regulation is well-settled, having been reaffirmed by this Court less than three months ago. *See Chase Bank USA, N.A. v. McCoy*, 131 S. Ct. 871 (2011). And the petition identifies no division of authority in the federal courts of appeals or state supreme courts regarding the construction of § 229.43(a). Petitioner's challenge to the decision below is thus nothing more than a fact-bound plea for error correction that does not merit review by this Court.

STATEMENT

1. From 1950 until his retirement 1991, respondent worked for petitioner and its predecessor. Pet. App. 5a & n.1.[1] During the first four years of his tenure, he worked as a fireman. *Id.* at 5a. Starting in 1954 and continuing until his retirement, respondent was an engineer on diesel locomotives. *Id.*

Throughout his employment with petitioner, respondent was exposed to asbestos and diesel exhaust fumes. *Id.* Respondent testified that loose asbestos was stored on the floor in the building where he worked as a fireman and that it covered the pipes of the diesel locomotives in which he worked as an engineer. *Id.* He further testified that, as an engineer, he was exposed to diesel exhaust fumes that entered through leaks in the windows, doors, and floorboards of the cabs of the locomotives in which he worked. *Id.* at 5a-6a. And he explained that he was exposed to diesel exhaust working in the yard where the locomotives operated. *Id.* at 6a. Respondent's former co-worker, Larry Berger, corroborated respondent's testimony regarding the presence of asbestos and diesel exhaust fumes in the locomotives and the yard. *Id.* at 13a-14a; Tr. 566-75.

Respondent suffered from a variety of health problems resulting from those working conditions. He developed breathing problems and, in 1986, was diagnosed with chronic obstructive pulmonary disease (also known as "COPD"). *Id.* Later that decade, respondent underwent surgery for heart problems.

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[1] The Court views the facts "in the light most favorable to the verdict winner" (here, respondent). *Wharf (Holdings) Ltd. v. United Int'l Holdings, Inc.*, 532 U.S. 588, 590 (2001).

Id. In 2000, respondent was diagnosed with laryngeal cancer. *Id.*[2]

2. In March 2005, respondent sued petitioner, asserting claims under FELA. Pet. App. 4a.[3] He alleged that, while working for petitioner, he was exposed to asbestos and diesel exhaust and that, as a result of that exposure, he developed COPD, heart conditions, and laryngeal cancer. *Id.* Respondent asserted that petitioner's failure to maintain safe working conditions was negligent and that those conditions violated LIA. With respect to his claim that the presence of diesel exhaust in the cabs of the locomotives in which he worked violated LIA, respondent relied on the FRA's regulation interpreting LIA to require that "[p]roducts of combustion shall be released entirely outside the cab and other compartments. Exhaust stacks shall be of sufficient height or other means provided to prevent entry of products of combustion into the cab or other compartments under usual operating conditions." 49 C.F.R. § 229.43(a).

Under FELA, a railroad's violation of a safety statute such as LIA constitutes negligence per se. *See Urie v. Thompson*, 337 U.S. 163, 189 (1949).

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[2] Respondent testified that, before 2005, he was not aware of the dangers of the substances to which he was exposed while employed by petitioner. Pet. App. 6a. In that year, he attended a picnic for former employees of petitioner where he saw a sign posted regarding breathing problems and heard other retirees discussing such issues. *Id.*

[3] FELA § 1 provides, in pertinent part, as follows: "Every common carrier by railroad . . . shall be liable in damages to any person suffering injury while he is employed by such carrier . . . for such injury . . . resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier." 45 U.S.C. § 51.

Such a violation also precludes the railroad from seeking to reduce or eliminate its liability by arguing that the plaintiff's own negligence also contributed to the injury. *See* 45 U.S.C. § 53 ("[N]o such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee.").

At trial in 2008, petitioner presented the testimony of a former employee of the FRA, Edward English, who last worked for that agency in 2001. Tr. 982. Mr. English opined that a violation of § 229.43(a) would occur only if a locomotive's exhaust system was "defect[ive]" or if the amount of diesel exhaust present in the cab failed to meet "OSHA [Occupational Safety and Health Administration] standards." Tr. 1000-02. Mr. English did not identify any published FRA interpretation supporting his view of the FRA's regulation.[4] He also "admitted that[,] under the circumstances described by [respondent] and Berger [his co-worker], a violation of the LIA occurred." Pet. App. 13a.

With respect to the jury instructions, the trial court received proposed instructions in writing from the parties and heard argument regarding the instruc-

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[4] Petitioner notes (at 7 n.3) that the trial court granted a motion *in limine* regarding a 1996 report to Congress prepared by the FRA. But petitioner sought to use that report for a different purpose — namely, to address the presence (or lack) of *asbestos* in locomotive cabs, not to establish the proper interpretation of the FRA's regulation on *diesel exhaust*. *See* Def.'s Bench Br. Regarding Admissibility of FRA's Locomotive Crashworthiness and Cab Working Conditions Report to Congress (Oct. 24, 2008); Pet'r C.A. Br. 33-34 (June 25, 2009); Pet'r C.A. Reply Br. 7 (Sept. 24, 2009).

tions on and off the record. Tr. 1103, 1155-62.[5] Following closing arguments and before instructing the jury, the court gave the parties an opportunity to note on the record any objections to the court's final proposed jury instructions. Tr. 1260-63. The court observed that petitioner had "requested that I strike the language, 'in the slightest degree[,]' from the causation definition." Tr. 1260. Petitioner added that it "believe[d] that the jury should just be charged in the language of the statute, and the statute says 'in whole or in part,' and that is the standard for a violation of the FELA, and that's what . . . the charge should be." Tr. 1261. Petitioner stated no other objection to the jury instructions. *See* Tr. 1260-63. In particular, it did not indicate any objection to the lack of an instruction on "proximate cause." *See id.*

The trial court denied petitioner's objection and instructed the jury regarding causation as follows:

> For purposes of action under the FELA, an injury or damage is said to be caused or contributed to by an act or a failure to act that plays any part in the matter, however slight, in bringing about and actually causing injury or damage to Mr. Shepard. So if you find from a preponderance of the evidence in this case that the Defendant Railroad was negligent to any degree or failed to provide Plaintiff with a reasonably safe place to work and this contributed in any way toward an injury or a disease or damage suffered by Mr. Shepard, then you may find that such

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[5] Petitioner proposed an instruction requiring the jury to find that the railroad's negligence "was a proximate cause of" respondent's injury. Def.'s Proposed Jury Instructions at 35.

injury or damage was caused by the Defendant's acts or omissions.

. . .

. . . It is important to remember that there can be more than one cause of an injury or condition. Involvement with any other cause does not prevent a finding for the Plaintiff, so long as you find that the — either the employer's negligence under the FELA or a violation of the Locomotive Inspection Act played any part, no matter how slight, in causing injury to the Plaintiff.

You've heard evidence that Plaintiff suffers from lung and respiratory disease. It is up to you to determine whether the Defendant, under either of these two statutes, played any part, even the slightest, in bringing about his condition. If you find that the Defendant's acts played no part in bringing about these injuries, then I charge you that the Defendant is not liable for these injuries, and Plaintiff, having failed on the question of causation, your job is done; you find for the railroad.

You should only award damages to the extent that the injury or disease is caused by a failure on the part of the railroad to abide by either or both of these two statutes. Under the FELA, the railroad does have to exercise ordinary care to furnish its employees with a reasonably safe place to work. That is a nondelegable duty on the part of the railroad; that is, they can't shift the duty to someone else. However, the railroad does not ensure the safety of its employees.

So again, to recover as to the Defendant, the Plaintiff has the burden of proving, as we said, by a preponderance of the evidence that there was

> either negligence under the FELA or a violation of the Locomotive Inspection Act, and that either violation contributed in whole or in part to his disease or his condition.

Tr. 1282-85.

The jury returned a verdict in respondent's favor. Pet. App. 5a, 31a. It found that petitioner violated FELA and LIA. *Id.* at 5a. And it awarded $872,756 in damages to respondent. *Id.*

The trial court denied petitioner's motion for JNOV or a new trial. *Id.* at 31a-35a. In so doing, the court rejected petitioner's argument that "the Court erred in instructing the jury that the railroad is liable if its negligence played any part, even in the slightest, in causing Plaintiff's injuries." *Id.* at 34a. It explained that "[t]he phrase 'even in the slightest' comes from" this Court's decision in *Rogers*. *Id.*

The court also rejected petitioner's challenge to the sufficiency of the evidence supporting the jury's finding that petitioner violated LIA. It explained that respondent's testimony regarding his exposure to diesel exhaust fumes and asbestos supported the jury's verdict. *Id.* at 32a-33a.

In its motion for JNOV or a new trial, petitioner did not argue that the trial court erred in failing to instruct the jury on "proximate cause." Nor did it argue that deference was due to the testimony of its retained expert witness, Mr. English, regarding the proper interpretation of § 229.43(a).

3. The court of appeals of Ohio affirmed. Pet. App. 3a-30a.

Petitioner reiterated its claim that the trial court improperly included "the phrases 'however slight', 'no matter how slight' and 'even the slightest' [in] the

jury charge." Pet'r C.A. Br. 20. It argued that the jury should have been "charged pursuant to the specific language of the FELA, which, with reference to causation, includes the words 'in whole or in part.'" *Id.* at 20-21. Petitioner did not contend that the trial court should have given its proffered instruction on "proximate cause."[6] The court of appeals rejected petitioner's claim of instructional error, relying on this Court's decision in *Rogers*. Pet. App. 14a-17a.

Petitioner also challenged the sufficiency of the evidence supporting the jury's finding that respondent's exposure to diesel exhaust constituted a violation of LIA. Although petitioner argued that respondent was obligated either to identify a defect in the exhaust system of a locomotive in which he worked or to show that exhaust levels exceeded OSHA standards, it did not contend that deference should be given to Mr. English's interpretation of § 229.43(a). *See* Pet'r C.A. Br. 13-19. The court of appeals rejected petitioner's argument, concluding that the record supported the trial court's denial of petitioner's JNOV motion. Pet. App. 11a-14a. The court noted that Mr. English "admitted that[,] under the circumstances described by [respondent] and Berger [his co-worker], a violation of the LIA occurred." *Id.* at 13a.

The Supreme Court of Ohio declined petitioner's request for discretionary review. *Id.* at 1a-2a.

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[6] *Cf.* Pet'r C.A. Br. 24 (arguing that the jury should "be instructed to determine whether the railroad's negligence caused the plaintiff's injury in whole or in part, i.e., that it was a proximate cause of the injury").

REASONS FOR DENYING THE PETITION

I. THE PETITION SHOULD NOT BE HELD PENDING *McBRIDE* BECAUSE PETITIONER DID NOT PRESERVE THE ISSUE PRESENTED IN THAT CASE

Petitioner contends (at 15) that this case should be held pending resolution of *McBride* because it "presents the same issue" of "whether FELA requires the plaintiff to establish proximate causation." But petitioner did not preserve the claim that proximate causation is an element of a FELA claim. Accordingly, the petition should not be held pending *McBride* and instead should be denied.

The question presented in *McBride* is "[w]hether [FELA] requires proof of proximate causation." Cert. Pet. i, *McBride*, *supra* (filed Aug. 18, 2010). Petitioner did not preserve that issue in this case. Although petitioner proposed an instruction that would have required the jury to determine whether petitioner's negligence was a "proximate cause" of respondent's injuries, petitioner did not object to the omission of that instruction from the trial court's charge to the jury. *See supra* pp. 6-7.[7] Nor did petitioner raise the failure to give that instruction either in its motion for a new trial or in its brief on appeal. *See supra* pp. 9-10. Consequently, petitioner forfeited any claim that the jury should have been instructed to find that petitioner's negligence was a "proximate cause" of respondent's injuries.

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[7] *See also* Ohio R. Civ. P. 51(A) ("On appeal, a party may not assign as error the giving or the failure to give any instruction unless the party objects before the jury retires to consider its verdict, stating specifically the matter objected to and the grounds of the objection.").

Petitioner's objection to the use of "slight" and its variants in the jury instructions did not preserve the *McBride* issue. Objecting to an instruction that causation can be found where the negligence played a part, "however slight," in bringing about the injury is quite different from asserting that the jury must be instructed to find affirmatively that the negligence was a "proximate cause" of the injury.[8] Even if the trial court had sustained petitioner's objection and removed any reference to "slight" or "slightest" from the instructions, the jury charge still would not have included any mention of a common-law requirement of "proximate cause."

Because petitioner failed to preserve an objection to the omission of a jury instruction on "proximate cause," it should not be permitted to seek any benefit from this Court's decision in *McBride*. The petition should be denied.

II. PETITIONER'S SECOND QUESTION IS NOT PROPERLY PRESENTED HERE AND REVIEW IS UNWARRANTED IN ANY EVENT

Petitioner contends (at 17) that the second question presented independently warrants this Court's review because the Ohio court of appeals should have given "deference" to "the FRA's interpretation of Section 229.43(a)." That claim is not properly presented in this case. Regardless, review is unwarranted.

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[8] The railroad in *McBride* argues that the language "any part, even the slightest" in the Court's opinion in *Rogers*, 352 U.S. at 506, is unrelated to "proximate cause." *See* Brief for Pet'r 38, *McBride*, *supra* (filed Jan. 13, 2011).

A. Petitioner Forfeited Its Deference Claim And, In Any Event, Identifies No Agency Interpretation To Which Deference Could Be Given

For two reasons, the second question is not properly presented here.

First, petitioner's deference claim was not pressed or passed on below.[9] Petitioner never argued that the state courts should defer to any FRA interpretation of the regulation in question, 49 C.F.R. § 229.43(a). Even assuming for the sake of argument that the testimony of petitioner's expert witness represented the view of the FRA (even though he had not worked for the agency in years), petitioner did not contend that the courts below owed *deference* to the expert witness's understanding of the regulation. Nor did it cite below any case from this (or any other) Court involving deference to an agency's regulatory interpretation.

Indeed, if petitioner had raised this argument for the first time in the Ohio court of appeals, and that court had held it to be forfeited, this Court would be jurisdictionally precluded from considering the issue under the adequate-and-independent-state-ground doctrine. *See, e.g., Coleman v. Thompson*, 501 U.S. 722, 729 (1991). Petitioner should not be rewarded for sandbagging the *entire* state judicial process, rather than just part of it.

Thus, as with its *McBride* claim, petitioner forfeited its deference claim by failing to raise it in the Ohio courts. Review is unwarranted for that reason

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[9] Petitioner concedes that the state appellate court did not decide the deference issue. *See* Pet. 13 ("The court of appeals did not address the FRA's interpretation of 49 C.F.R. § 229.43.").

alone. *See, e.g., Duignan v. United States*, 274 U.S. 195, 200 (1927) (Court generally does not review "questions not pressed or passed upon below").

Second, review of the second question presented is unwarranted in this case for the additional reason that petitioner identifies no *agency* interpretation to which deference could be given. It relies entirely on the testimony of its retained expert witness, a "*former*" employee of the FRA. Pet. 18 (emphasis added). But this Court considers deference claims only when a regulatory interpretation represents "*the agency's*" — not a former employee's — "fair and considered judgment on the matter in question." *Auer v. Robbins*, 519 U.S. 452, 462 (1997) (emphasis added). Thus, as the cases petitioner cites (at 17) illustrate, the Court has given weight to positions articulated in a legal brief filed by an agency (*Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 513-14 (1994)); a staff instruction document issued by an agency (*Lyng v. Payne*, 476 U.S. 926, 939 (1986)); and a bulletin and a report issued by an agency (*Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 417 (1945)). But petitioner cites no case, and we are aware of none, in which this Court deferred to the testimony of a paid expert witness who *used to* work for an agency. Because petitioner does not rely on an interpretation of the FRA — as opposed to its retained expert witness, who no longer works for the agency — the question of deference due to an agency's interpretation of its own regulation is not presented in this case.

B. In Any Event, Review Is Unwarranted

Apart from those deficiencies, the second question presented is unworthy of this Court's consideration at this time. Petitioner identifies no conflict among

the federal courts of appeals or state supreme courts regarding the proper standard for determining the deference owed to an agency's regulatory interpretation. In fact, the standard is clear. Under this Court's cases, an agency's interpretation of its own regulation is "controlling," unless the interpretation is "plainly erroneous or inconsistent with the regulation" or does not "reflect the agency's fair and considered judgment on the matter in question." *Auer*, 519 U.S. at 461-62 (internal quotation marks omitted). Because the legal standard governing petitioner's claim is well-settled, the claim represents, at most, a fact-bound request for error correction.

Further, this case would be a poor vehicle in which to consider the deference question, because resolving that issue in petitioner's favor would not affect the outcome of the case. Petitioner's expert "admitted that[,] under the circumstances described by [respondent] and Berger [his co-worker], a violation of the LIA occurred." Pet. App. 13a. The jury was entitled to credit the testimony of respondent and his co-worker regarding the conditions in which they worked. Consequently, there was sufficient evidence to sustain the jury's verdict even under the construction of § 229.43(a) advanced by petitioner's expert.[10]

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[10] Petitioner rightly concedes (at 4) that, where (as here) the jury finds a violation of LIA, a railroad cannot benefit from a comparative-negligence defense. FELA plainly provides that, when a railroad violates a safety statute such as LIA, and that violation "contribute[s] to" the employee's injury, the employee will not "be held to have been guilty of contributory negligence." 45 U.S.C. § 53. This Court has long given that language in FELA § 3 its plain meaning and explained that railroads cannot rely on the defense of contributory negligence in cases involving violations of safety statutes. *See Urie*, 337 U.S. at 188 (§ 3 "bar[s] pleading[] of . . . contributory negligence . . . 'in any case

Moreover, the Ohio courts' interpretation of the FRA's regulation is correct, and petitioner's contrary interpretation is erroneous. The regulation provides as follows: "Products of combustion shall be released entirely outside the cab and other compartments. Exhaust stacks shall be of sufficient height or other means provided to prevent entry of products of combustion into the cab or other compartments under usual operating conditions." 49 C.F.R. § 229.43(a).

By its plain terms, that regulation requires that exhaust fumes "be released *entirely* outside the cab" and specifies that the exhaust system must "*prevent* entry" of exhaust fumes "into the cab." *Id.* (emphases added). The regulation contains no language indicating that there must be a specific defect in the exhaust system or that the amount of exhaust fumes in the cab must exceed some threshold set by OSHA before a failure "to prevent entry" of fumes into the cab constitutes a violation. Petitioner's contrary construction finds no support in the regulation's text or history.[11]

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where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee'") (quoting 45 U.S.C. § 53).

[11] The Federal Register notice that petitioner cites (at 6-7, 18) says only that "it is impossible to prevent the entry of some fumes into the cab *in certain* ***unusual*** *wind and weather conditions*." 45 Fed. Reg. 21,092, 21,098 (Mar. 31, 1980) (emphases added). That is fully consistent with the regulation's plain language, which provides that, "under *usual* operating conditions," exhaust fumes must be kept out of the cab. 49 C.F.R. § 229.43(a) (emphasis added); *see* 45 Fed. Reg. at 21,098 ("means must be provided to *prevent* entry of products of combustion into the cab *under usual operating conditions*") (first emphasis added). Petitioner does not argue that respondent's exposure to diesel exhaust fumes occurred only in "certain unusual wind and weather conditions." *Id.*

In any event, regardless of the merits of petitioner's interpretation of the FRA's regulation, petitioner did not present its deference argument to the Ohio courts, and it cannot obtain this Court's review by presenting that argument for the first time here.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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